David O. Butts
Attorney at Law

Renasant Center, Suite 110
398 East Main Street
Tupelo, MS 38804

Civil and Criminal
Litigation
****
davidbutts@davidbuttslawfirm.com
Website: www.davidbuttslawfirm.com

Telephone: 662-841-1234
Facsimile: 662-841-0357

May 2, 2016

Ms. Muriel B. Ellis, Clerk
Supreme Court of Mississippi
Court of Appeals
450 High Street
Post Office Box 249
Jackson, Mississippi 39205

RE: *Swindol v. Aurora Flight Sciences, Inc.*, No. 2015-FC-01317-SCT

Dear Ms. Ellis:

The letter submitted by Appellee Aurora Flight Sciences, Inc. ("Aurora") addresses two decisions rendered since the issuance of this Court's opinion in this case. As required by the last sentence of M.R.A.P. 28(k), Appellant's response is "similarly limited." Neither of the cases cited by Aurora supports its argument that this Court should ignore the Legislature's clear instructions, in MISS. CODE § 45-9-55, that possession of a firearm in the circumstances it contemplates is a legally impermissible reason for terminating an employee. In fact, both cases undermine Aurora's position.

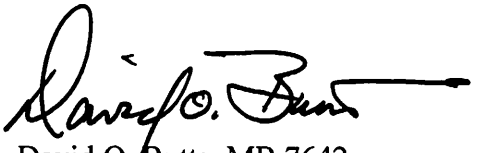
This Court's recent decision in *Roop v. Southern Pharmaceuticals Corp.*, 2016 WL 1376605 (Miss. Apr. 7, 2016), is an entirely ordinary application of the "narrow public-policy exception to Mississippi's employment-at-will doctrine" created by *McArn v. Allied Bruce-Terminix Co.*, 626 So. 2d 603 (Miss. 1993), for discharge of an employee who has "report[ed] illegal acts of his employer," 2016 WL 1376605, at *4. Since the claim in *Roop* was a standard *McArn* claim, there was no need for that opinion to discuss the long-recognized power of the Legislature to abrogate the at-will rule through "express legislative action," *Kelly v. Mississippi Valley Gas Co.*, 397 So. 2d 874, 875 (Miss. 1981), that declares certain reasons for termination "legally impermissible," *McArn*, 626 So. 2d at 606. Unsurprisingly, this Court's opinion in *Roop* does not even cite the opinion it handed down two weeks earlier in this case. If anything, then, this Court's application of *McArn* in *Roop* demolishes Aurora's suggestion that this Court's opinion in *Swindol* caused a "sea change in Mississippi jurisprudence." Appellee Aurora Flight Sciences, Inc.'s 28(k) Letter 2 (Apr. 29, 2016) ("28(k) Letter").

Aurora cites *Roop*'s statement that illegal activity triggers the *McArn* exception only if "the acts complained of warrant the imposition of criminal penalties," *Roop*, 2016 WL 1376605, at *4, opining that this language is inconsistent with the opinion here. 28(k) Letter 1. Not so. *Roop* simply reaffirms that a criminal-penalty requirement applies to the *McArn* exception at issue in that case. It says nothing to limit the Legislature's power to exempt *additional* activity from the at-will rule by declaring certain reasons for termination "legally impermissible." *Shaw v. Burchfield*, 481 So. 2d 247, 254 (Miss. 1985); *see* Appellant's Opp'n to Appellee's Mot. For Reh'g 5–6 (Apr. 14, 2016) ("Rehearing Opp."). And in any event, as Amicus the National Rifle Association of America, Inc., points out, a violation of Section 49-9-55 very likely *does* "warrant the imposition of criminal penalties," *Roop*, 2016 WL 1376605, at *4, by way of MISS. CODE. § 99-19-31. *See* Amicus Br. of the Nat'l Rifle Ass'n of America, Inc. in Opp. to Reh'g at 9 (Apr. 14, 2016).

Aurora's reliance on the recent Court of Appeals decision in *Frank v. City of Flowood*, 2016 WL 1564267 (Miss. Ct. App. Apr. 19, 2016), is equally misplaced. *Frank* merely declined to extend *McArn* to reach "an employee who reports criminal activity related to his employer's business" when "the crime is committed by a non-employee third party." *Id.* at *6. Like *Roop*, *Frank* is a garden-variety disposition of a *McArn* claim that has nothing at all to say about the situation in this case, where the Legislature has acted to expressly declare a particular reason for discharge legally impermissible. And Aurora's suggestion that *Frank* is "the first glimpse" of a new era wrought by the opinion in this case in which "the employment at-will doctrine and separation of powers may be disposed of through modification of common law rules, at the pleasure of the courts," 28(k) Letter 2, is a bit hard to take seriously in view of the fact that *Frank*—after *citing this very opinion* as "reiterat[ing] the longstanding rule" that the narrow exceptions announced in *McArn* ought not to be judicially expanded—*declined to extend McArn*, *Frank*, 2016 WL 1564267, at *8.

Frank indeed underscores that this Court's jurisprudence in this area of law is grounded "squarely on the constitutional separation of powers and the judiciary's duty to interpret and apply the law as it is written." *Id.* at *7. But if Aurora is right that "the separation of powers in Mississippi is in danger" in this case, 28(k) Letter 2, *it is Aurora's argument* that this Court should brazenly ignore the Legislature's clear instructions in Section 45-9-55 that is the source of that peril.

Respectfully submitted,



David O. Butts, MB 7642
Attorney for Robert Swindol